PRUDENTIAL ASSURANCE MALAYSIA BHD

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S1(S7) 21-34-2001]
10 JANUARY 2003

REVENUE LAW: *Income tax - Assessment - Basis of assessment - Whether director general of Inland Revenue Board determined basis period of plaintiff correctly - Whether director general of Inland Revenue Board had properly exercised discretion under s. 21(3) of the Income Tax Act 1967 - Income Tax Act 1967, s. 21(3) - Income Tax (Amendment) Act 1999, s. 10*

This was the plaintiff's application seeking a declaration that the director general of the Inland Revenue Board ('DG') had wrongly determined under s. 21 of the Income Tax Act 1967 ('the Act') the basis period of the plaintiff, and that such determination was consequently null and void, or alternatively, that the DG, in arriving at his decision, had erred in law and fact in invoking the anti-avoidance provisions embodied in s. 10 of the Income Tax (Amendment) Act 1999.

The DG had determined the basis period of the plaintiff as follows: (a) 1 May 1998 to 30 April 1999 to be taxed for the year of assessment 2000 on preceding year basis; (b) 1 May 1999 to 31 December 2000 to be taxed for the year of assessment 2000 on current year basis; and (c) 1 January 2001 to 31 December 2001 to be taxed for the year of assessment 2001. The plaintiff contended the basis periods should have been determined as follows: (a) 1 May 1998 to 31 December 1999 to be taxed for the year of assessment 2000 on preceding year basis; (b) 1 January 2000 to 31 December 2000 to be taxed for the year of assessment 2000 on current year basis; and (c) exemption from tax for the period from 1 May 1998 to 31 December 1999. The only issue in this case that required determination was whether the DG had properly and correctly exercised his discretion under s. 21(3) of the Act.

Held:

[1] The DG's direction did not contravene the express provisions of the Act, in particular s. 21(3) thereof. That section clearly provided that where in the year of assessment, there was a failure to close the accounts on the

same date in the following year, as in this case, then the DG could direct the basis period (which may be of any length) for the following year or two following the years of assessment. Therefore, the DG's direction which was for a period of 12 months for the following year of assessment and 20 months for the next following year of assessment was well within the ambit of the provisions of the law. The DG's reluctance to accede to the request for the determination of the basis period for the preceding years and the current year was to ensure that the plaintiff did not get a waiver of tax for more than 12 months, which was in accordance with s. 10 of the Income Tax (Amendment) Act 1999. Hence, what the DG did was perfectly reasonable and neither a capricious nor unreasonable exercise of discretion. (pp 45 c, 51 h & 52 a)

[Application dismissed.]

Case(s) referred to:

Barnard v. National Dock Labour Board [1953] 2 QB 18 ***(refd)***

Canadian Pacific v. Telesat Canada [1982] 360 R 229 ***(refd)***

Comptroller Of Income Tax, States Of Malaya v. HKV [1968] 2 MLJ 260 HC ***(refd)***

Cookson v. Knowles [1979] AC 566 ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Gillick v. West Norfolk and Wisbech Health Authority [1986] AC 112 ***(refd)***

Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***

Hanson v. Radcliffe Urban District Council [1922] 2 Ch 490 ***(refd)***

Harper v. The Home Secretary [1955] Ch 238 ***(refd)***

Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93 ***(foll)***

Kelso v. The Queen [1981] 1 SCR 199 ***(refd)***

Liew Fook Chuan v. Menteri Sumber Manusia & Anor [1995] 3 MLJ 740 FC ***(refd)***

Malone v. Commissioner of Police [1979] Ch 344 ***(refd)***

Merrick and Anor v. Nott-Bower [1965] QB 57 ***(refd)***

Merricks v. Heathcoat-Amory [1955] Ch 567 ***(refd)***

Midland Bank v. Laker Airways [1986] 1 QB 689 ***(refd)***

Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

National Union Of Hotel, Bar And Restaurant Workers v. Minister Of Labour & Manpower [1980] 2 MLJ 189 FC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 FC ***(refd)***

Pyx Granite Co Ltd v. Ministry Of Housing And Local Government And Another [1958] 1 All ER 625 ***(refd)***

R v. Boundary Commission, ex p Foot [1983] 1 QB 600 ***(refd)***

R v. Department of Transport (Nos. 1 and 2), ex p. Factortame [1990] 2 AC 85 ***(refd)***

R v. DHSS, ex p Royal College of Nursing [1981] AC 800 ***(refd)***
R v. Electricity Commissioners [1924] 1 KB 171 ***(refd)***
R v. Hastings Local Board of Health [1865] 6 B & S 401 ***(refd)***
R v. Hillingdon London Borough Council, ex p Puhlhofer [1986] AC 486 ***(refd)***
R v. HM Treasury, ex p Smedley [1985] QB 657 ***(refd)***
Re Clay [1919] 1 Ch 66 ***(refd)***
Re F [1990] 2 AC 1 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 168(1)(b)
Income Tax Act 1967, ss. 2(1), 20, 21(3), 148
Income Tax (Amendment) Act 1999, ss. 9, 10, 20

For the plaintiff - Dato' M Anad Krishnan; M/s Anad & Noraini
For the defendant - Abu Tariq Jamaluddin, Legal Officer; Inland Revenue Board

[The plaintiff has appealed to the Court of Appeal vide Civil Appeal No: W-01-9-03]

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of encl. (1), the plaintiff sought for the following prayers:

1. Declarations that:

(a) The Director General of (the) Inland Revenue Board has wrongfully determined under Section 21 of the Income Tax Act 1967 (Act 53) (Revised 1971) that the basis period of the Plaintiff is as follows:

1st May 1998 to 30th April 1999 to be taxed for the year of assessment 2000 on preceding year basis;

1st May 1999 to 31st December 2000 to be taxed for the year of assessment 2000 on current year basis;

1st January 2001 to 31st December 2001 to be taxed for the year of assessment 2001;

and such determination by the Director General of Inland Revenue Board is consequently invalid and/or null and void.

(b) Alternatively, the Director General of the Inland Revenue Board in arriving at his decision (as) set out in paragraph (a) above, erred in law and on the facts in invoking the anti avoidance provisions embodied in Section 10 of the Income Tax (Amendment) Act 1999.

(c) The Director General of the Inland Revenue Board ought to have determined the basis periods for the Plaintiff as follows:

1st May 1998 to 31st December 1999 to be taxed for the year of assessment 2000 on preceding year basis;

1st January 2000 to 31st December 2000 to be taxed for the year of assessment 2000 on current year basis.

(d) The Plaintiff should be exempted from tax for the period from 1st May 1998 to 31st December 1999.

(e) In the event the Plaintiff has paid any monies as tax for the basis period as determined by the Director General of (the) Inland Revenue Board as set out in paragraph (a) above, such monies (shall) be refunded forthwith to the Plaintiff.

2. Costs; and

3. Such further or other relief as the Court deems fit and proper.

Facts Of The Case

The plaintiff was formerly known as Berjaya Prudential Assurance Berhad which was incorporated on 6 December 1983. On 6 April 1998, a company known as Sri Han Suria Sdn Bhd ("SHSSB"), which was incorporated on 8 December 1997, acquired 100% of the shares of Berjaya Prudential Assurance Berhad thereby making it a wholly owned subsidiary of SHSSB. Thereafter, Berjaya Prudential Assurance Berhad changed its name to Prudential Assurance Malaysia Berhad – the present plaintiff.

Prior to the acquisition of the shares of the plaintiff by SHSSB, the plaintiff's financial year end was April 30th – which was in line with the year end of its holding company known as Berjaya Capital Berhad. Whereas SHSSB's year end is on 31 December. As provided for under s. 168(1)(b) of the Companies Act 1965, the plaintiff being a subsidiary company of SHSSB was obliged to change its financial year so that it coincides with that of its holding company, namely, SHSSB. Thus, according to the plaintiff with its change in the accounting year end to that of 31 December, the accounts of the plaintiff would be made up as follows:

Financial Periods	Number Of Months
1 May 1997 to 30 April 1998	twelve (12) months
1 May 1998 to 31st December 1998	eight (8) months (change of year to 31 December 1998)
1 January 1999 to 31 December 1999	twelve (12) months
1 January 2000 to 31 December 2000 and thereafter	twelve (12) months

By letter dated 13 July 1998, the plaintiff wrote to Bank Negara Malaysia and informed the Governor that the plaintiff was changing its name to Prudential Assurance Malaysia Berhad and further that the plaintiff was also changing its financial year end to 31 December. So, according to the plaintiff, its accounts for 1998 would be from 1 May 1998 to 31 December 1998 – a period of eight months. On 23 October 1998 – which was the budget day, the Minister of Finance whilst presenting the 1999 budget in Parliament announced that the tax assessment system based on income derived in the preceding year would be changed to the current year, beginning from the year 2000. In order to facilitate this change, the Minister of Finance also announced a tax waiver of income derived in 1999. So it was pointed out that by reason of the change in the plaintiff's financial year end, the plaintiff did not make up its accounts for the period from 1 May 1998 to 30 April 1999 but instead the plaintiff's accounts were made for the period from 1 May 1998 to 31 December 1998. That being the case, the plaintiff then sought directions from the Director General ("DG") as to the basis period for the year of assessment 2000 under s. 21 of the Income Tax Act 1967 (Act 53) (Revised 1971) (hereinafter referred to as the "Act"). The plaintiff's tax agent by the name of Messrs Pricewaterhouse Coopers Taxation Services Sdn Bhd ("PCTSB") wrote a letter dated 10 November 1999 to the DG explaining about the accounts of the plaintiff in these words (see exh. "CJK 5" of encl. 2):

> PRUDENTIAL ASSURANCE MALAYSIA BERHAD
> TAHUN TAKSIRAN 2000
> C 2899590-02
>
> We refer to our letter dated 13 November 1998 regarding the change in the financial year by our client, Prudential Assurance Malaysia Berhad (Prudential or the Company), from 30 April to 31 December. This change in the Company's financial year end was made in accordance with the provisions of Section 168(1)(b) of the Companies Act 1965 (Companies Act), upon the sale by Berjaya Capital Berhad of its stake of 68.83 per cent in the Prudential shares in 1998. Photocopies of the relevant newspaper articles as reported in The New Straits Times and The Star Business dated 28 January 1998 and

18 July 1998 respectively together with an extract of Notes 26 and 27 of the Company's 1997/1998 Annual Report are attached for your attention.

As explained previously, the accounts of Prudential have been/will be made up as indicated below:

01.05.1997 to 30.04.1998	(12 months)
01.05.1998 to 31.12.1998	(8 months) (Change of year – end to 31.12.1998)
01.01.1999 to 31.12.1999	(12 months)
01.01.2000 to 31.12.2000	(12 months)

Since 1999 is a failure year, the direction of the basis periods for the year of assessment 2000 on preceding and current year bases will be made in accordance with Section 21(3) of the Income Tax Act 1967 as follows-

Basis period	Year of assessment	Remarks
01.05.1998 to 31.12.1999	2000 (preceding year basis)	Tax on income of 20 months waived
01.01.2000 to 31.12.2000	2000 (current year basis)	Income of 12 months chargeable to tax

The accounts for the 8 and 12 months periods ending on 31 December 1998 and 31 December 1999 respectively are made in compliance with the provisions of section 169 of the Companies Act. As these accounts are made up for periods not exceeding 12 months, we are of the opinion that Section 10 of The Income Tax (Amendment) Act 1999 (Amendment Act) is not applicable.

As you are aware, Section 10 of the Amendment Act was introduced as an anti-avoidance provision and was intended to apply to cases where the change in the financial year end was effected to take advantage of the waiver year.

Since the change in the financial year end of Prudential was to comply with the provisions of the Companies Act brought about as a result of the disposal of Prudential shares by Berjaya Capital Berhad in July 1998, we are of the view that the change falls outside the scope of Section 10 of the Amendment Act. Therefore, the company should not be subject to the restriction of its basis period for the waiver year to 12 months.

An extract of Section 10 of the Amendment Act relating to Transitional Provisions is reproduced below for your easy reference:

> Where the accounts of a business are made up for a period of more than twelve months, the basis period for the year of assessment 2000

for the business in respect of which the accounts have been made up shall not exceed twelve months and the remaining period shall constitute a part of the basis period for that source for the following year of assessment.

Based on the foregoing, we would appreciate it if you could confirm that the above basis periods for the year of assessment 2000 on preceding and current year bases are in order on an urgent basis.

Yang benar,
Sgd. (Illegible)
Chooi Tat Chew
Pengarah Eksekutif

The DG responded by letter dated 7 December 1999 and it was worded in this way (see exh. "CJK 6" of encl. 2):

Prudential Assurance Malaysia Bhd
Tahun Taksiran 2000

Dengan hormatnya saya merujuk surat tuan bertarikh 10 November 1999.

2. Peruntukan Seksyen 10 Akta Cukai Pendapatan 1967 (Pindaan) terpakai untuk pelanggan tuan bagi Tahun Taksiran 2000 (preceding year basis). Berikut adalah tempoh asas bagi tahun-tahun taksiran berkenaan:-

1 Mei 1998 - 30 April 1999:	T/Taksiran 2000 (Preceding year basis)
1 Mei 1999 - 31 Disember 2000:	Tahun Taksiran 2000 (Current year basis)
1 Januari 2001 - 31 Disember 2001:	Tahun Taksiran 2001.

'BERKHIDMAT UNTUK NEGARA'

'BERSAMA MENYUMBANG UNTUK PEMBANGUNAN NEGARA'

Saya yang menurut perintah,

Sgd. (Illegible)
(HALIJAH BULAT)
UNIT 15.2
Cawangan Syarikat Kuala Lumpur.
B.p. Ketua Eksekutif/Ketua Pengarah Hasil Dalam Negeri,
Lembaga Hasil Dalam Negeri,
Malaysia.
HBI//rm

A meeting was held on 27 December 1999 between the plaintiff's representatives and the officer of the assessment branch of the Inland Revenue Board. By letter dated 20 January 2000, the latter reaffirmed their earlier ruling of the basis period as set out in the letter dated 7 December 1999 as reproduced above. Another meeting was held between the plaintiff's tax agent and the officer of the assessment branch on 21 February 2000 in order to discuss the Inland Revenue Board's direction pertaining to the basis periods as set out in the letter dated 7 December 1999 as reproduced above and as set out in exh. "CJK6" of encl. 2. Following that meeting, PCTSB submitted an appeal to the assessment branch of the Inland Revenue Board by letter dated 21 April 2000 as seen in exh. "CJK8" of encl. 2 and that appeal was in relation to the letter dated 7 December 1999 as reproduced above.

Now, that appeal that was made by PCTSB as per the letter dated 21 April 2000 was referred to the technical division of the Inland Revenue Board who confirmed in their internal memorandum to the assessment branch of the Inland Revenue Board the direction of the basis periods as set out in the letter dated 7 December 1999 as reproduced above. The internal memorandum was dated 13 June 2000 and it was worded in this way (see exh. "CJK9" of encl. 2):

From: Assistant Director General (T)

To: Assistant Director General
Inland Revenue Board
Assessment Branch, Kuala Lumpur

Attention: Puan Halijah Bulat

Your ref:	Our ref:	Date:
C2899590-02	LHDN.01/35/(S)/42/51/358-1	13.6.2000

Prudential Assurance Malaysia Berhad (PAMB)

We refer to your letter dated 19.5.2000.

2. Please be informed that as PAMB has failed to make up their accounts to 30 April 1999, therefore the previous subsection 21(3) will apply. Under subsection 21(3), the Director General may direct the basis period for the following or two following years of assessment. Thus, the Director General has directed the basis periods to be as follows:

Year of assessment	**Basis period**
2000 (preceding year)	1.5.1998 – 30.4.1999
2000 (current year)	1.5.1999 – 31.12.2000

3. Kindly note that the new subsection 21(3) is effective from 1.1.2000 for year of assessment 2000 (current year). Section 10, Income Tax Act (Amendment) Act 1999 will apply if the accounts are made up for a period of more than 12 months.

Thank you.

On 6 October 2000, a meeting was held between PCTSB and an officer of the technical division and in that meeting PCTSB handed over an opinion from M/s Anad & Noraini addressed to the plaintiff dated 2 October 2000 where it sought a review of their earlier decision. But the technical division of the Inland Revenue in its letter dated 14 October 2000 as per exh. "CJK11" of encl. 2 to PCTSB once again confirmed the direction of the basis periods as set out in their letter dated 7 December 1999 as reproduced above as well as in their letter dated 20 January 2000 as per exh. "CJK7" of encl. 2.

Basically, this was what the DG had said:

(1) That contrary to what was set out in the letter dated 7 December 1999 as per exh. "CJK6" of encl. 2 and as reproduced above, s. 10 of the Income Tax (Amendment) Act 1999 did not apply to the facts of the present case.

(2) That the guidelines on the application of the discretion given to the DG under s. 21 of the Income Tax Act, 1967 and as reproduced in the various text books and marked as exh. "CJK12" of encl. 2 did not originate from the Inland Revenue Department and even if they were, these guidelines were mere suggestions on possible directions that could be issued by the Department.

(3) That the DG's exercise of his discretion under s. 21 of the Income Tax Act 1967 in determining the basis period as set out in the letter dated 7 December 1999 as per exh. "CJK6" of encl. 2 was proper and correct.

(4) That if the basis period was determined in accordance with the wishes of the plaintiff, it would mean that the plaintiff would obtain a tax waiver of 20 months even though the plaintiff was entitled to 12 months from 1 May 1998 to 30 April 30, 1999.

(5) That if the plaintiff's request was acceded to, it would not be fair to the other tax payers as the plaintiff would be able to get a waiver for a period of 20 months, whereas the other tax payers would only get 12 months.

It was submitted that the DG's denial that the guidelines originated from him had been shown to be inaccurate, misleading or incorrect. The DG, on the other

hand, said that although the guidelines for the interpretation of s. 21(3) of the Act was issued by them yet it was only meant for internal use and not for public dissemination.

The Basic Preliminaries

Three different types of periods are relevant and should be considered when one computes tax under the Act, and these periods may be itemised as follows:

(i) year of assessment;

(ii) basis year, and

(iii) basis period.

It is a combination of the above periods that facilitates the ascertainment of tax a person has to pay. Section 2(1) of the Act defines a "year of assessment" as a "calendar year". Thus, the year of assessment for 2000 would run from 1 January 2000 to 31 January 2000.

Prior to the year 2000, Malaysia has a "preceding year" basis of assessment. s. 20 of the Act provides that the "basis year" refers to the "calendar year" immediately preceding a year of assessment. The following example would suffice: the "basis year" for the year of assessment for 1999 is for 12 months and that would be from 1 January 1998 to 31 December 1998. Generally speaking, and in the "preceding year" basis of assessment, the Act provides that the "basis year" for a year of assessment shall constitute the "basis period" for that year of assessment. Thus, the "basis period" for the year of assessment for 1999 would be computed from 1 January 1998 to 31 December 1998. It must be emphasised that the basis period for any year of assessment is certainly pertinent because it is the period on the profits of which tax for that year falls to be assessed.

In tabling the 1999 budget, the Minister of Finance proposed that the preceding year of assessment system be changed to the current year of assessment with effect from the year 2000. With this change, it would mean that income derived in the year 2000 will no longer be assessed in the year 2001 but in the year 2000 itself. In order to facilitate this change, the Income Tax (Amendment) Act, 1999 (Act 1055) – hereinafter referred to as the "Amendment Act", was passed whereby section 20 of the Act was amended. Prior to the amendment, section 20 of the Act was worded in this way:

> Basis years
>
> 20. For the purposes of this Act, the calendar year immediately preceding a year of assessment shall constitute the basis year for that year of assessment."

After the amendment, the new s. 20 of the Act enacts as follows:

Basis years

20. For the purposes of this Act, the calendar year coinciding with a year of assessment shall constitute the basis year for that year of assessment.

It is because of this statutory change that the year of assessment for the year 2000 has two basis periods. Firstly, the basis period in relation to the income derived in the year 1999 (preceding year basis). Secondly, the basis period in relation to the income derived in the year 2000 (current year basis). Now, to relief the burden on taxpayers from payment of tax on income derived from two periods in the year of assessment for the year 2000, the defendant – being magnanimous, proposed to waive the tax on income derived in the year 1999. This means that for the year of assessment for the year 2000, tax will not be charged on income derived in the year 1999. Tax that needs to be paid for the year of assessment for the year 2000 is based only on income derived in the year 2000 only.

Every tax payer benefits from the proposal of the Minister of Finance.

The transitional provisions in regard to the waiver period are contained in the Amendment Act. The relevant provisions of the transitional provisions of the Amendment Act are worded in these ways:

TRANSITIONAL PROVISIONS

General provisions

7.(1) The principal Act shall apply for the purposes of this Part unless otherwise provided.

(2) Where there is any inconsistency between any provision of this Part and any provision of the principal Act, that provision of the principal Act shall be void to the extent of the inconsistency.

Waiver of tax

8. Tax on the income of any person for the year of assessment 2000 shall be waived except for the tax on the following:

(a) income from an employment received by a non-citizen or a non-resident individual who commences or ceases that employment in the year 1999;

(b) dividends, notwithstanding that the dividends are treated as business income; and

(c) income which is subject to withholding tax under section 109, 109B or 109C of the principal Act.

Basis period in certain cases

9. Where the accounts of a business have been made up to a date other than 31 December in the year 1998 and the accounting period has been taken as the basis period in respect of that business for the year of assessment 1999 and that business ceased in the year 1998 after the accounting period, the period which begins on the day after the end of that basis period until the day the business ceased shall for the purposes of the waiver be deemed to be the basis period ending in the year 1999.

Basis period shall not exceed twelve months

10. Where the accounts of a business are made up for a period of more than twelve months, the basis period for the year of assessment 2000 for the business in respect of which the accounts have been made up shall not exceed twelve months and the remaining period shall constitute a part of the basis period for that source for the following year of assessment."

It is germane to mention that the policy and the object of the Amendment Act are reflected in ss. 9 and 10 thereof; and that would be that the basis period for the year of assessment in 2000 on preceding year basis shall not be more than 12 months. This meant that the waiver period was intended not to be more than 12 months.

The Case For The Plaintiff

The learned counsel for the plaintiff submitted that the plaintiff's case hinged on the following salient points:

(1) That s. 10 of the Amendment Act was not applicable to the facts of the present case.

(2) That the plaintiff's financial year was changed not to take advantage of the waiver year but rather to follow the holding company financial year.

(3) That the change was mandated by the Companies Act 1965.

(4) That the plaintiff agreed that because of the change, section 21(3) of the Act shall apply.

(5) That the plaintiff agreed that the DG is vested with the discretionary power to direct the basis period of the plaintiff.

(6) But the plaintiff alleged that the DG has wrongly exercised his discretion by his failure to consider:

(a) his own guidelines;

(b) the financial year change that was meant to follow the holding company financial year;

(c) the income of the plaintiff has to be pro-rated; and

(d) the exempt account of the plaintiff would be less because the period of exemption would be lessened.

(7) That the implementation of the tax legislation was not on the basis of fairness or unfairness.

(8) That the DG's guidelines should be interpreted strictly.

(9) That the extra exempt periods were mere bonuses from the Minister of Finance.

The Issue Of The Day

There was only one issue to be decided and that was whether the DG has properly and correctly exercised his discretion under s. 21(3) of the Act? I would answer this issue in favour of the DG. I shall now proceed to elaborate further.

The Plaintiff's Financial Year And The DG's Direction

The plaintiff submitted that its financial year was prepared based on the following periods:

Financial periods	Number of months
1 May 1997 to 30 April 1998	Twelve (12) months
1 May 1998 to 31 December 1998	Eight (8) months (change of year to December 31, 1998)
1 January 1999 to 31 December 1999	Twelve (12) months
1 January 2000 to 31 December 2000 and thereafter	Twelve (12) months

Now, as the financial year of the plaintiff has changed from 30 April to 31 December, the basis period of the plaintiff shall be determined in accordance with s. 21(3) of the Act which enacts as follows:

21(3) Where:

(a) by virtue of subsection (2) there has been taken as the basis period for a year of assessment:

(i) in the case of a company, a financial year; or

(ii) in any other case, an accounting period,

ending on a day other than 31st December in the basis year for that year of assessment; and

(b) there is a failure to make up the accounts of the company, or of the business to which the accounting period relates, for a financial year or an accounting period, as the case may be, ending on the corresponding day in that year of assessment,

the Director General may direct that, for any of its sources consisting of a business (in the case of a company) or for the source consisting of the business to which the accounting period relates (in any other case), the basis period for the following year of assessment or the basis periods for the two following years of assessment shall consist of a period or periods (which may be of any length) specified in the direction; and any period so specified for that following year of assessment and any period so specified for the later of those two following years of assessment shall constitute the basis period for that following year of assessment and for that later year respectively.

and it gives the DG not only the power to direct the basis period of the plaintiff but also it also gives the DG the power to make that direction for any length of time. It is now undisputed that the DG had issued a direction to the plaintiff in the following manner (see encl. 10 at para. 7):

Basis Period	**Year Of Assessment**
(a) 1 May 1998 to 30 April 1999	year of assessment 2000 (preceding year basis)
(b) 1 May 1999 to 31 December 2000	year of assessment 2000 (current year basis)

But the plaintiff was unhappy and was not pleased with the DG's direction and for that reason the plaintiff filed encl. (1) and sought those prayers. The plaintiff suggested that the proper and correct direction which the DG should adopt would be as follows:

Basis Period	**Year Of Assessment**
(a) 1 May 1998 to 30 December 1999	year of assessment 2000 (preceding year basis)
(b) 1 January 2000 to 31 December 2000	year of assessment 2000 (current year basis)

Discretion

Basically everything revolved on the discretion of the DG. That the DG has the necessary power under s. 21(3) of the Act to direct the basis period of the plaintiff can never be doubted and that was not the issue of the day. Rather, the issue was in regard to the manner in which the discretion was exercised.

As to how a discretion should be exercised, I must refer to some germane authorities on the subject in question. Firstly, I need to refer to the case of *National Union Of Hotel, Bar And Restaurant Workers v. Minister Of Labour And Manpower* [1980] 2 MLJ 189, a decision of the then Federal Court (Raja Azlan Shah CJ (Malaya), Chang Min Tat FJ & Abdoolcader J), and Raja Azlan Shah CJ (Malaya) (as His Majesty then was) aptly said at p. 190 to p. 191 of the report:

> The criteria adopted by the courts in the process of judicial review of administrative actions are expressed in general terms, and there is no agreed terminology. As was said by Lord Wilberforce in Secretary of State for Education and *Science v. Tameside Metropolitan Borough Council* [1976] 3 All ER 665, 682:
>
> > There is no universal rule as to the principles on which the exercise of a discretion may be reviewed; each statute or type of statute must be individually looked at.
>
> Thus we must construe the Industrial Relations Act, 1967, to determine its policy and object. It cannot be gainsaid that the intention of the Act is to regulate the relations between management and labour and to prevent and settle trade disputes arising therefrom. Briefly, it provides machinery for investigating, determining and settling such disputes by arbitration, conciliation and reference to the Industrial Court, and in implementing it, policy decisions come into play. The courts call this 'discretion' , meaning that the decision is one for the Minister to make, and not for the courts. It is a matter of discretion depending upon the satisfaction of the Minister with respect to the expediency of making such a reference. But if the Minister, by reason of his having misconstrued the Act or for some other reason, so exercises his discretion in a way as to defeat the policy and object of the Act, then he has clearly exercised it wrongly. In that case the courts will interfere with the exercise of his discretion by saying that he has given no weight, or has given insufficient weight, to the considerations that ought to have weighed with him, or if he has been influenced by considerations which ought not to have weighed with him.

Secondly, it would be the case of *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195, a decision of the then Supreme Court (Hashim Yeop A Sani CJ (Malaya), Harun Hashim and Ajaib

Singh SCJJ). There, Hashim Yeop A Sani CJ (Malaya) succinctly said at p. 198 of the report:

> A general guideline on the functions of the court before interfering in the exercise of an executive discretion can be found in the judgment of Lord Greene MR in the celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223. The courts can only interfere with an act of executive authority if it be shown that the authority has contravened the law. Secondly, the court is not a court of appeal in such matters. Thirdly, the exercise of such discretion is governed by certain principles and so long as the exercise is within the four corners of these principles, the discretion is absolute and cannot be questioned in a court of law. Lord Greene elaborated on those principles and they are that the exercise of the discretion must be a real exercise of the discretion and that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. If the authority fails to observe these principles, the exercise of discretion cannot be said to be 'reasonable'. Lord Greene then summed up his guideline as follows:
>
> > The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

Continuing at p. 199 of the report, his Lordship Hashim Yeop A Sani CJ (Malaya), in style, had this to say:

> The Minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

Thirdly, the case of *Liew Fook Chuan v. Menteri Sumber Manusia & Anor* [1995] 3 MLJ 740, must be referred to. That was a decision of Abu Mansor J (who later rose as FCJ) and, at p. 747 of the report, his Lordship aptly said:

> What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or

> by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion, it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act makes it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

Fourthly, it would be the decision of Lord Scarman in the case of *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93, a decision of the House of Lords (Lord Wilberforce, Lord Diplock, Lord Fraser Of Tullybelton, Lord Scarman and Lord Roskill). There, Lord Scarman writing a separate judgment had this to say at p. 112 of the report:

> Notwithstanding the *Treasury* case in 1872, I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly, to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise, to ensure that there are no favourites and no sacrificial victims.

And his Lordship Lord Scarman rounded it up by saying (see p. 113 of the report):

> It is, however, not decisive of either issue, and, for the reasons given by Ackner LJ in the Court of Appeal, I would refuse to introduce into the public law the fine distinction, which the House in that case considered to exist, between the duty of a rating authority and the duty of a taxing authority. I am, therefore, of the opinion that a legal duty of fairness is owed by the Revenue to the general body of taxpayers. It is, however, subject to the duty of sound management of the tax which the statute places on the Revenue.

All these authorities are thought provoking and they are of great utility in adjudicating encl. (1). These authorities showed that there are relevant factors to be taken into account in determining whether the DG had exercised his discretion properly and reasonably under s. 21(3) of the Act. These factors may conveniently be listed as follows:

(1) that the exercise of discretion must be within the ambit of the statute;

(2) that the DG must have regard to the policy and object of the statute;

(3) that the DG must have regard to those matters which are expressly or by necessary implication stated in the statute that conferred the discretion; and

(4) that in exercising his discretion, the DG must be fair to the general body of tax payers at large.

The defendant submitted through its learned counsel that the DG had considered the factors as listed above and, consequently, it was strenuously argued that the DG had exercised his discretion properly and correctly under the law.

In my judgment, the DG's direction did not contravene the express provision of the Act – in particular s. 21(3) thereof. That section clearly provides that where in the year of assessment there is a failure to close the accounts on the same date in the following year – just like the present case at hand, then the DG can direct the basis period (which may be of any length) for the following year or two following years of assessment. Clearly therefore that the DG's direction which was for a period of 12 months for the following year of assessment and 20 months for the next following year of assessment, was well within the ambit of the provision of the law.

In regard to the policy and object of the statute, it was submitted on behalf of the defendant that the proposed change to the tax system from the preceding to the current year of assessment has expressly or by implication introduced a special policy and object of the Act in relation to the income derived in the year 1999. I cannot but agree with these kinds of submissions. Clearly, therefore, the policy can readily be construed by looking at the transitional provisions found in the Amending Act itself which categorically provide that income that was derived in the year 1999 to be waived. Section 10 of the Amending Act provides that the basis period for the year of assessment 2000 (preceding year basis) shall not be more than 12 months. The effect of this restriction would be that the waiver period will not be more than 12 months.

If the object and policy of the Act allowed waiver for any period of time, then there was no necessity to provide for such a restriction in the Amending Act itself. The provision on waiver as set out in the Amending Act must be given effect.

I take note and I seek solace in the speech of Lord Scarman in the case of *Inland Revenue Comrs v. National Federation Of Self-Employed and Small Businesses Ltd (supra)* where his Lordship took into account the speeches of other Law Lords in regard to the need to be fair to all taxpayers. There at p. 112 of the report, Lord Scarman had this to say:

> Authority for this view is plentiful, *albeit* only persuasive in character. Viscount Simon LC in *Latilla v. Inland Revenue Comrs* [1943] 1 All ER 265

at 266,[1943] AC 377 at 381, 25 Tax Cas 107 at 117, discussing the evil of tax avoidance schemes, commented that 'one result of such methods, if they succeed, is … to increase, pro tanto, the load of tax on the shoulders of the great body of good citizens…' In the *Arsenal* case [1977] 2 All ER 267 at 272, [1979] AC I at 17 Lord Wilberforce commented, admittedly in the context of rates but in terms which cannot rationally exclude a taxpayer, that 'To produce a sense of justice is an important objective of taxation policy'. In *Vestey v. Inland Revenue Comrs* [1977] 3 All ER 1073 at 1098, [1979] Ch 177 at 197, [1977] STC 414 at 439 Walton J said that it is in 'the interest not only of all individual taxpayers…. but also in the interests of the Revenue…that the tax system should be fair', and in *Vestey v. Inland Revenue Comrs (No 2)*[1979] 2 All ER 225 at 234, [1979] Ch 198 at 204, [1978] STC 567 at 575 that:

> even if, contrary to my views, extra-statutory concessions are permissible and do form part of our tax code, nevertheless they do represent a published code, which applies indifferently to all those who fall, or who can bring themselves, within its scope.

In the same case, when it reached the House, Lord Edmund-Davies, speaking of the House's decision in *Congreve v. Inland Revenue Comrs* [1948] 1 All ER 948, 30 Tax Cas 163, said ([1979] 3 All ER 976 at 1003, [1980] AC 1148 at 1196, [1980] STC 10 at 37):

> But if it be permitted to stand, we have the deplorable situation that the Inland Revenue can **capriciously** select which of several beneficiaries they are going to tax… (emphasis added).

The duty of fairness as between one taxpayer and another is clearly recognised in these (and other passages) in the modern case law. Is it a mere moral duty, a matter for policy but not a rule of law? If it be so, I do not understand why distinguished judges allow themselves to discuss the topic: they are concerned with law, not policy. And is it acceptable for the courts to leave matters of right and wrong, which give rise to genuine grievance and are justiciable in the sense that they may be decided and an effective remedy provided by the courts, to the mercy of policy? Are we in the twilight world of 'maladministration' where only Parliament and the ombudsman may enter, or on the commanding heights of the law? The courts have a role, long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed on the Revenue are complex and call for management decisions in which discretion must play a significant role.

In issuing a direction under s. 21(3) of the Act, the DG was certainly required to give due regard to the policy and object of the Act in respect to the waiver

period. And waiver should not be more than 12 months. Although section 10 of the Amending Act only applies to specific instances, like for example, when the accounts are prepared for more than 12 months, yet the existence of such a provision can be construed to mean that the whole policy and object of the waiver year would be that the exempt period shall not be more than 12 months. This would certainly include and extend to taxpayers who prepare their accounts for less than 12 months.

The plaintiff did suggest that the DG should issue a direction in the manner as suggested by the plaintiff as alluded to somewhere in this judgment. If the DG were to accede to the plaintiff's suggestion and issue the direction along the lines as suggested by the plaintiff, there would be turmoil. It would result in an extremely different treatment as to how the basis period of the plaintiff and the other taxpayers would be determined. If that were to happen, then there would be unfairness. The unfairness would be like this. That the basis period of the plaintiff will be more than 12 months while the other taxpayers would be restricted to 12 months only.

However, to a certain extent, if the suggestions of the plaintiff were to be followed the plaintiff would stand to gain approximately 20 months period of waiver. That would certainly be unfair and it cannot be a proper and correct exercise of discretion by the DG. The direction as issued by the DG as stipulated in encl. 10 at para. 7 and which was reproduced somewhere in this judgment was the correct and proper exercise of discretion by the DG. Every taxpayer must be treated alike.

When the legislature uses the word "may" in s. 21(3) of the Act, it is purposely done in order to give the DG a wide discretion to make the direction. Section 148 of the Act too gives the DG or the Minister certain powers and it is worded in this way:

> 148 **Provisions as to approvals and directions given by Minister or Director General**
>
> Where by or under this Act there is conferred on the Minister or the Director General power to give an approval or direction or any kind (not being a power exercisable by statutory order):
>
> (a) an approval or direction given in the exercise of that power shall not be regarded as subsidiary legislation;
>
> (b) that power shall be deemed to include:
>
> (i) power to give any such approval or direction with retrospective effect;

(ii) power to vary or revoke any such approval or direction retrospectively or otherwise ; and

(iii) power to give any such approval or direction subject to such conditions as the Minister or the Director General, as the case may be, may think fit to impose; and

(c) any such approval or direction shall take effect when it is given or, where the Minister or Director General as the case may be specifies a date on which it is to take effect, on that date.

But the power of discretion given to the DG or the Minister has to be exercised fairly and with care. It must produce a "sense of justice" and fair play. It must be fair.

When the Amendment Act was gazetted on 8 July 1999 and it came into force on or about 8 July 1999, it spelled trouble to the plaintiff. Section 10 of the Amendment Act stipulates that the basis period shall not exceed 12 months whereas the plaintiff had all done up its accounts from 1 May 1998 to 31 December 1998 and from 1 January 1999 to 31 December 1999. Even the plaintiff's accounts for the period 1 May 1998 to 31 December 1998 were published and announced. But the final say must surely come from the DG and the DG has exercised his discretion by issuing that direction. It was argued on behalf of the plaintiff that the DG was restrained by law to exercise his discretion properly and judiciously. It was pointed out that the exercise of the discretion in determining what should be the basis year should be done on a legal basis and based on precedents or guidelines. It was also pointed out that even if the DG makes the determination on what he thinks is in the public interest, such determination could still be challenged if it can be shown to be unjustified. In *Pyx Granite Co Ltd v. Ministry Of Housing And Local Government And Another* [1958] 1 All ER 625, CA, Lord Denning writing a separate judgment had this to say at p. 633 of the report:

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however desirable that object may seem to them to be in the public interest. If they mistake or misuse their powers, however *bona fide*, the court can interfere by declaration and injunction. See *Sydney Municipal Council v. Campbell* [1925] A.C. 338; 94 L.J.P.C. 65; 133 L.T. 63; 11 Digest (Repl.) 119, 120 ([1925] A.C. 338 at p. 343); *Roberts v. Hopwood* [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 33 Digest 20, 83 ([1925] A.C. 578

at p. 613) and *Smith v. East Elloe Rural District Council* [1956] 1 All E.R. 855; [1956] A.C. 736; 120 J.P. 263; 3rd Digest Supp. ([1956] 1 All E.R. 855 at p. 867).

So, the question to pose would be this: was there a misuse of power by the DG when he issued that direction? I would answer this question in the negative. What the DG did was within the law and it was applicable to all the taxpayers in the country.

In *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 FC, the decision of the Land Executive Committee was challenged. That was a case where the respondent who was the registered owner of a piece of land in perpetuity had applied for sub-division and approval for development including permission to build a hotel on the sub-divided land. The enabling Act clearly provided that the Land Executive Committee which had the jurisdiction to deal with such applications could impose conditions "as it may think fit". So the Land Executive Committee imposed various conditions but one condition which the respondent did not agree to was one which stated that on surrendering the land, the respondent was to receive it back in respect of the part to be retained by it, a title not in perpetuity but rather by way of a lease for 99 years. Suffian LP at p. 146 of the report aptly said in that case:

> English cases are of course decisions on the peculiar words used in the Town and Country Planning Act, whereas here we are concerned with the peculiar words used in the National Land Code, but nevertheless I am of the opinion that English cases afford principles that may be followed here. What are these principles? They are:
>
> 1. The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes.
>
> 2. The conditions, to be valid, must fairly and reasonably relate to the permitted development.
>
> 3. The approving authority must act reasonably and planning conditions must be reasonable.
>
> 4. The approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to it in the public interest.
>
> Applying these principles to the present case, it is plain, in my judgment, that the Committee does not have the power it claims to have. The condition which the applicant objected to does not relate to the permitted development, is unreasonable, and is used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which, we are told,

since the war only leases, not titles in perpetuity, are granted. However desirable this object may seem to the Committee, it has no power under the law to achieve it in the way used here.

Raja Azlan Shah Ag CJ (Malaya) (as His Majesty then was), writing a separate judgment in that case, in style said (see p. 148 of the report):

> Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite (ante)* and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that `public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts L.J. in *Bradbury v. London Borough of Enfield* [1967] 3 All E.R. 434, 442).

Now, applying these salient passages from these very learned judges, I have to pose these questions and provide the answers thereto:

(a) Did the DG act reasonably when he gave that direction? Yes.

(b) Did the DG exercise his discretion unreasonably? No.

(c) Was the DG's discretion wrongly exercised? No.

I will now refer to the case of *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248, a decision of the Court of Appeal (Gopal Sri Ram JCA, Siti Norma Yaakob JCA, Ahmad Fairuz JCA), where the Court of Appeal equated a public decision maker like the Datuk Bandar Kuala Lumpur to be akin to a trustee when exercising its discretion under the relevant statute. At p. 268 of the report, Gopal Sri Ram JCA had this to say:

> Statutes that confer discretion upon a public decision-maker have come before the Courts on previous occasions, giving rise to a large body of jurisprudence upon the subject. Hence, the principles that govern a case such as the present are not in doubt. Indeed, Counsel before us stand upon common ground in relation to the principles of law that are well-settled and beyond challenge. The difference between them really lies within the narrow confines of the application of those principles to the particular facts of the present appeal.
>
> In our judgment, the present case falls to be decided by reference to the following proposition of law which we consider to be incontrovertible.
>
> First, a public decision-maker – and the present appellant is such a person – upon whom a power or discretion is vested by Parliament is akin to a trustee. He is under an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. It matters not a jot to the principle that the language employed in the conferment of the power or discretion is of wide amplitude.

His Lordship Gopal Sri Ram JCA continued further and this was what he said (see p. 269 to p. 270 of the report):

> Second, where the exercise of a discretion is challenged on grounds of *vires* that is illegality, or unreasonableness, the Court is not confined merely to the decision-making process, but may examine the merits of the decision itself. That clouds of uncertainty that had pervaded this area of the law have now been swept away by the landmark decision of the Federal Court in *R. Rama Chandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147; [1997] 1 AMR 433. We have applied it in this Court on several occasions. See, for example, *Majlis Perbandaran Seberang Perai v. Tropiland Selangor Bhd. Bhd.* [1996] 3 CLJ 837; [1996] 3 MLJ 94. It has very recently been affirmed by another division of the Federal Court in *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd Noh* [1997] 2 CLJ 11; Civil Appeal No. 02-57-93.
>
> Third and lastly, a public decision-maker whose exercise of discretion is questioned must meet the challenge by adducing relevant and admissible evidence.

Now, the DG's reluctance to accede to PCTSB's request for the determination of the basis period for the preceding year and the current year was to ensure that the plaintiff did not get a waiver of the tax for more than 12 months. What the DG did was perfectly reasonable. It was not a capricious and an unreasonable exercise of discretion.

Section 10 of the Amendment Act, as reproduced earlier, was certainly applicable to the facts of the present case. That section was passed solely for the purpose of preventing companies from avoiding their tax liability by changing their basis period so that they could not do their accounts for a period of more than 12 months and then claim the tax waiver. Of course, it goes without saying that in interpreting statutes various principles ought to be adopted. This is particularly so when one interprets the Taxing Act. Ong Hock Sim J (as he then was) did just that when he adjudicated the case of *Comptroller Of Income Tax, States Of Malaya v. HKV* [1968] 2 MLJ 260, and there his Lordship even resorted to quote from *Maxwell on Interpretation of Statutes*. This was what his Lordship said (see p. 261 of the report):

> While it is true that a secondary wife is a married woman, I would quote from the Six Widows Case that 'the Courts of the Straits Settlements will recognize polygamous unions for purposes of succession and legitimacy'. To seek to include secondary wives within section 47(1) would in my view require very plain and unambiguous language. I would quote from Maxwell on interpretation of Statutes (11th Edition) pages 278-9:
>
> > In a Taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. A construction, for example, which would have the effect of making a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear and precise to that effect. In a case of reasonable doubt the construction most beneficial to the subject is to be adopted. Still less is the language of a section to be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words.

Continuing further, this was what his Lordship had to say (see p. 261 to p. 262 of the report):

> I would also read from *Craies on Statute Law* 6th Edn., at pages 112 and 113:
>
> > Express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes, *inter alia*: Imposing a tax or charge; … If a statute professes to impose a charge, 'the rule' said the Judicial Committee in *Oriental Bank v. Wright*, is 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language.' In *Dock Co.* at *Kingston-upon-Hull v. Browne*, Lord Tenterden C.J. said: 'These rates are a tax on

> the subject and it is a sound general rule that a tax shall not be considered to be imposed (or at least for the benefit of a subject) without a plain declaration of the Legislature to impose it.' This accords with the view expressed by Parke B. in Re Micklethwait: 'It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words.' In *Partington v. Attorney-General*, Lord Cairns said: 'I am not at all sure that, in a case of this kind – a fiscal case – form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute'.

So it can be surmised that:

(1) equity does not apply to tax;

(2) there is no presumption in regard to tax;

(3) the language employed in the Tax Act must be examined – conscious, always, that there is nothing to be implied;

(4) no one can be taxed twice unless the words adopted are clear, precise and unambiguous; and

(5) in the case of reasonable doubt, the construction most favourable to the taxpayer will be adopted and effected.

Reverting back to the issue of unfairness, I have this to say. By way of an illustration, suppose a company has changed its financial year in order to follow its holding company – just like the present plaintiff, but that company in doing so and in good faith prepares its account for a period of more than 12 months. The company will not, because of s. 10 of the Amendment Act, get the same extra months of the waiver period. This would certainly amount to an unfair tax treatment to that company and to the general body of taxpayers at large. So, to avoid this unfair situation, the DG must in exercising his discretion avoid such an eventuality. The DG should not use his discretion to create such a

situation. In the words of Lord Scarman in *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd (supra)*, the DG owes a legal duty of fairness to the general body of taxpayers.

In the context of the present case, the DG had acted fairly. It was part and parcel of my judgment that the DG's direction will not in any way put the plaintiff to any disadvantage as compared to the other taxpayers at large. All the other taxpayers will be treated alike. They will all get the 12 months waiver period.

I must now go into specifics. I must lay emphasis that:

(1) The applicability of s. 10 of the Amendment Act was accentuated on account of the issue of the discretionary powers of the DG. That section would certainly assist in ascertaining the object and policy of the Act during the waiver year.

(2) To the arguments that the financial year change was not done to take advantage of the waiver year but rather to follow the holding company that was mandated by the Companies Act 1965, I must, at once, say that those facts were irrelevant considerations in ascertaining the basis period during the waiver year.

(3) The plaintiff argued that it did not take advantage of the situation, but the final outcome of the plaintiff's suggested basis period will create an unfair tax treatment among the general taxpayers at large. So the DG, in exercising his discretion, did not allow such an eventuality to happen. To the DG, his discretion must be exercised in a fair manner and this he did. Under the DG's direction, the plaintiff would still get the 12 months waiver period.

(4) In regard to the argument that the Companies Act 1965 allowed the plaintiff to adopt the style of taxation which the plaintiff had suggested, I must respond by saying that the DG in exercising his discretionary powers had resorted to the Act in question. The DG too had also referred and relied on the Amendment Act. At this juncture, the speech of Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in the case of *National Union Of Hotel Bar And Restaurant Workers v. Minister Of Labour And Manpower (supra)* as reproduced earlier in this judgment would certainly apply.

(5) The plaintiff disputed the powers of the DG under the Act and under the Amendment Act and the plaintiff heavily relied on the internal

guidelines that were issued by the DG to his officers. However, it must not be forgotten that the DG's direction was in accordance with the DG's own guidelines that were first issued in 1968.

(6) But the defendant was quite magnanimous. The defendant conceded that during the waiver year or specifically in relation to the year of assessment 2000 (preceding year basis – referring to income derived in the year 1999), the guidelines on how the DG should exercise his discretion was not followed. But the defendant submitted that the reasons for not following the guidelines were because of the major and important change of the Malaysian tax system. That change was a movement from the preceding to the current year of assessment. That proposed change came about with a one year waiver or exempt period. To facilitate the waiver, the provisions relating to payment and the basis period have been overridden by the Transitional Provisions that were alluded to in the early part of this judgment.

(7) In order to achieve uniformity and to be consistent with the policy and object of the Act that introduced the change in the Malaysian tax system, the guidelines were no longer relevant during the waiver period. To follow the guidelines would be disastrous; unfairness would prevail among the taxpayers at large.

(8) In any event and at any rate, the DG was and is certainly authorised to amend his own guidelines. Now, for the waiver year the guidelines were superceded by a new DG's internal circular. The new internal circular was consistent with the direction that was issued by the DG. So, with the advent of the new internal circular, any company or taxpayer having the same problem like the plaintiff will be issued with the same direction. In short, the new DG's internal circular was used as a guideline when the DG issued the direction. That direction not only applied to the plaintiff, it also applied to all the taxpayers at large. That was certainly fairness at its best.

(9) It was submitted that all the circulars emanating from the pen of the DG were meant for internal purposes. It was also submitted that the DG's internal circulars were not intended for the scrutiny of members of the public as well as tax agents. Moreover, so the submission went, there were no proofs that members of the public or the tax agents have access to the DG's internal circulars. These submissions were indeed interesting and thought provoking.

(10) It was submitted that the DG's internal circulars should not be equated at par with the taxing statutes – like the Act and the Amendment Act. It was submitted that the DG's internal circulars have no force of law. These submissions too were very interesting.

(11) Fairness was the name of the game. Here, there was fairness all round (see the speech of Lord Scarman in *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd (supra)* – where his Lordship emphasised that Revenue owe a legal duty of fairness to the general body of taxpayers).

(12) In regard to the issue that was raised by the plaintiff that its income will have to be pro-rated if the DG's direction was to be sustained, the defendant responded in this fashion. That it was an acceptable practice that the income of an individual has to be pro-rated if that individual could not determine the income derived for the particular basis period. Obviously, the defendant's response was correct. The underlying principle of tax would simply be this. That the individual's income must not be taxed twice. Here, the DG's direction will not tax the same income twice.

At any rate, there exists no jurisdiction to grant declaratory reliefs where the issues are not justifiable. The jurisdiction does not extend to moral, social or political issues where no legal or equitable rights arise or public law decisions are involved (*Malone v. Commissioner of Police* [1979] Ch 344). In *Gouriet v. Union of Post Office Workers* [1978] AC 435 at 501 G, Lord Diplock aptly said:

> But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.

But the power of the court to intervene on judicial review is certainly not confined to decisions by public bodies but it can be extended to guidance given by public bodies (*Gillick v. West Norfolk and Wisbech Health Authority* [1986] AC 112; and *R. v. DHSS, ex p Royal College of Nursing* [1981] AC 800). But I hasten to add that the warning given by Lord Bridge in *Gillick (supra)* as to the care with which the court has to exercise the jurisdiction in those fringe areas should be borne in mind. Warnings in similar terms have also been sounded by the House of Lords. Lord Brightman, for instance, in the case of *R v. Hillingdon London Borough Council, ex p. Puhlhofer* [1986] AC 486 aptly said:

> Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted its decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely.

In *Barnard v. National Dock Labour Board* [1953] 2 QB 18, at 41, Lord Denning LJ proudly declared:

> I know of no limit to the powers of the court to grant a declaration except such limit as it may in its discretion impose upon itself.

Lord Diplock made it clear in *Gouriet v. Union of Post Office Workers (supra),* particularly at p. 501 B and C that:

> Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary; it is a useful power and over the course of the last hundred years it has become more and more extensively used – often as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is ultra vires and void. Nothing that I have to say is intended to discourage the exercise of judicial discretion in favour of making declarations of right in cases where the jurisdiction to do so exists. But that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights.

But the court's jurisdiction to grant declarations are also restricted. Thus, declarations concerning:

(1) parliamentary privileges (*R v. HM Treasury, ex p Smedley* [1985] QB 657 at 672; *R. v. Boundary Commission, ex p Foot* [1983] 1 QB 600 at 634; *R. v. Hastings Local Board of Health* [1865] 6 B & S 401; *R v. Electricity Commissioners* [1924] 1 KB 171 at 209; *Merricks v. Heathcoat-Amory* [1955] Ch 567; *Harper v. The Home Secretary* [1955] Ch 238; and *R v. Department of Transport (Nos. 1 and 2), ex p. Factortame* [1990] 2 A.C. 85);

(2) extra-legal issues (*Merrick and Another v. Nott-Bower* [1965] QB 57; *Canadian Pacific v. Telesat Canada* [1982] 360 R 229 at 256; and *Kelso v. The Queen* [1981] 1 SCR 199); and

(3) where there is no dispute, actual or apprehended between the parties (*Re Clay* [1919] 1 Ch 66; *Midland Bank v. Laker Airways* [1986] 1 QB 689; and *Re F* [1990] 2 AC 1),

are restricted in its scope. I am to say and I so say that the most important feature of a declaratory judgment is that it is a flexible and a discretionary remedy. In *Hanson v. Radcliffe Urban District Council* [1922] 2 Ch 490 at 507, Lord Sterndale MR stressed the importance of the discretionary element in this way:

> In my opinion, under Order 25, rule 5, (now Order 15, rule 16) the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide.

Any refusal to grant the declaration which the applicant seeks must not be based upon the judicial whim of the judge. The reasons for the refusal must be set out by the judge so that the discretion is seen to be exercised judicially and not in a selective and discriminatory manner. Towards this end, the speech of Lord Diplock in *Cookson v. Knowles* [1979] AC 566 is certainly useful to read.

I have set out the reasons in this judgment as to why the declarations that the plaintiff sought in encl. 1 should be disallowed.

It was part and parcel of my judgment that:

(1) the DG had exercised his discretion properly and rightly under the law;

(2) the DG's direction was consistent with the policy and object of the Act together with the Amendment Act at the time of the exempt period;

(3) the DG's direction was fair in that it would avoid an unjust treatment between the plaintiff and the other taxpayers in the country;

(4) that the internal guidelines were not followed in the particular year of assessment so that there would be consistency with the policy and object of the Act;

(5) to blindly follow the internal guidelines would create unfairness in that there would be inequality of tax treatment between the plaintiff and the other taxpayers at large;

(6) the grounds of objections as raised by the plaintiff were irrelevant and not necessary for the DG to consider; and of crucial importance

(7) the DG's direction will not deprive the plaintiff from the twelve (12) months exempt period.

For all these reasons, I must dismiss encl. (1) with costs. I did that without hesitation.